

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

E-Filed on 4/2/07

1 3993 Howard Hughes Parkway, Suite 600  
2 Las Vegas, NV 89169-5996  
3 Facsimile (702) 949-8321  
4 Telephone (702) 949-8320

5 Susan M. Freeman AZ State Bar No. 004199  
6 Email: sfreeman@lrlaw.com  
7 Rob Charles NV State Bar No. 006593  
8 Email: rcharles@lrlaw.com

9 Attorneys for USACM Liquidating Trust

10 **UNITED STATES BANKRUPTCY COURT  
11 DISTRICT OF NEVADA**

12 In re:

13 USA COMMERCIAL MORTGAGE  
14 COMPANY,

15 USA CAPITAL REALTY ADVISORS,  
16 LLC,

17 USA CAPITAL DIVERSIFIED TRUST  
18 DEED FUND, LLC,

19 USA CAPITAL FIRST TRUST DEED  
20 FUND, LLC,

21 USA SECURITIES, LLC, Debtors.

22 Case No. BK-S-06-10725-LBR  
23 Case No. BK-S-06-10726-LBR  
24 Case No. BK-S-06-10727-LBR  
25 Case No. BK-S-06-10728-LBR  
26 Case No. BK-S-06-10729-LBR

27 **CHAPTER 11**

28 Jointly Administered Under Case No.  
29 BK-S-06-10725 LBR

30 **JOINDER AND SUPPLEMENT TO  
31 OBJECTION TO ADMINISTRATIVE  
32 EXPENSE CLAIM OF SIERRA  
33 LIQUIDITY FUND**

34 **Affects:**

- 35   × All Debtors
- 36    .. USA Commercial Mortgage Company
- 37    .. USA Capital Realty Advisors, LLC
- 38    .. USA Capital Diversified Trust Deed Fund, LLC
- 39    .. USA Capital First Trust Deed Fund, LLC
- 40    .. USA Securities, LLC

41 The USACM Liquidating Trust (“USACM Trust”) joins and supplements the  
42 objection to the administrative expense claim filed by Sierra Liquidity Fund, L.L.C. [Dkt.  
43 3088] (“Sierra” and “Sierra Claim”) filed by the Debtor, pursuant to its post-Effective  
44 Date authority under the Order Granting Second Joint Motion for Order for

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 Implementation of Confirmed Plan [Dkt. 2987, 3309]. This response is explained in the  
2 following Memorandum and is supported by the Court's record in the administrative file  
3 and in the adversary proceedings described below.

4 **Background**

5 Sierra requests an expense of administration for the losses allegedly suffered by the  
6 persons from whom it bought interests in Direct Loans. Sierra makes no showing of any  
7 contact, much less contract, with USA Commercial Mortgage Company ("USACM") as  
8 debtor in possession.

9 The loans at issue in the Sierra Claim are: 3685 San Fernando Road, Binford  
10 Medical, Brookmere, Hesperia II, Margarita Annex, Oak Shores II, Placer Vineyards, and  
11 Marquis Hotel. Sierra implies that (1) the failure to collect each loan in full is due to  
12 USACM's unjustified decision to not collect the loan, (2) the loans, when collected, will  
13 involve a deficiency of at least 25% of the value of the loan, and (3) such a deficiency is  
14 the result of a 25% decline in market value during the pendency of the bankruptcy cases,  
15 all assumptions that are not supported by any fact in the record. To the contrary, and by  
16 way of example only:

- 17 • Rather than suffer a foreclosure sale, Binford Medical sued all Direct  
18 Lenders alleging pre-petition breach of contract and demanding that no foreclosure be  
19 allowed, Adv. No. 06-10725-lbr;
- 20 • The Placer Vineyards loan is the subject of a motion filed with this Court  
21 where information supplied by the parties suggests that the first loan is fully secured; and
- 22 • Marquis Hotel, owed by USA Investors, VI, is the subject of an involuntary  
23 bankruptcy petition filed in this Court, No. 06-13925-lbr, causing an automatic stay under  
24 11 U.S.C. § 362(a), where the Court has appointed an interim trustee to administer the

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 estate.<sup>1</sup> Notably, the evidence in the record suggests that there is equity in the alleged  
2 debtor's property that adequately protects the direct lenders' interest.

3 Sierra's rights against USACM arise under Loan Servicing Agreement(s) where  
4 Sierra purchased the loans. None of the LSAs were assumed in this case as executory  
5 contracts under 11 U.S.C. § 365(a).

6 **Argument**

7 **I. The Sierra Claim Is Not Based on a Transaction with USACM**

8 Courts have held that a party claiming administrative expense priority must prove  
9 (1) that the debt arose from a transaction with the debtor-in-possession or gave  
10 consideration to the debtor and (2) that the transaction directly and substantially benefited  
11 the estate.<sup>2</sup>

12 The USACM Trust understands that Sierra is a claims trader that bought interests in  
13 non-performing loans post-petition, and even after the motion to sell USACM's servicing  
14 rights that spelled out the loans' non-performing status. The Trust further understands that  
15 Sierra refused to enter into a Loan Servicing Agreement ("LSA"). It appears that Sierra  
16 did not want to transact business with USACM, but only to take advantage of a potential  
17 increase in value of its loan interests over the price it paid for them, and perhaps a  
18 potential litigation opportunity as well. Indeed, the Sierra Claim and James Riley affidavit  
19 supporting the Sierra Claim recite information and belief about typical LSA language.<sup>3</sup>

21 <sup>1</sup> This estate may also be subject to the terms of the Temporary Restraining Order issued  
22 by the Central District of California, Riverside Division, District Court in the *Russell v.*  
*USA Investment Partners* Receivership action, Case No. EDCV07-0343 SGL (JCRx).

23 <sup>2</sup> *In re BCE West. L.P.*, 319 F.3d 1166 (9<sup>th</sup> Cir. 2003); *Matter of TransAmerican Natural*  
24 *Gas Corp.*, 978 F.2d 1409, 1416 (5<sup>th</sup> Cir. 1992) (claimant must establish a *prima facie* case  
25 by showing that: (1) the claim arises from a transaction with the debtor-in-possession; and  
26 (2) the goods or services supplied enhanced the ability of the debtor-in-possession's  
business to function as a going concern); *In re Enron Corp.*, 279 B.R. 695, 705 (Bankr.  
S.D.N.Y. 2002) (the purpose of administrative expenses is to facilitate reorganization by  
engaging third parties "who might be reluctant to deal with a debtor-in-possession").

<sup>3</sup> Sierra Claim ¶ 6; Riley affidavit [Dkt. 3090] ¶ 5.

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 Sierra apparently was not assigned any rights under any LSA by its Direct Lender  
2 assignors.

3 The point of administrative expense claim status is to enable a bankruptcy estate to  
4 induce creditors into entering into transactions post-petition, and encourage third parties to  
5 supply the debtor with goods and services.<sup>4</sup> Sierra's acquisition of interests in loans,  
6 without committing to a LSA, is not a transaction with the USACM bankruptcy estate as  
7 required for an administrative expense claim.

8 **II. Sierra Did Not Provide an Actual, Necessary Benefit to the USACM Estate**

9 Sierra also has not met the test of proving that it provided an actual, necessary  
10 benefit to the USACM bankruptcy estate. It certainly has not provided any goods or  
11 services to the estate. In cases where administrative expense claims are based on an award  
12 of damages, it was clear that the estate benefited by not having to come out of pocket on  
13 costs it was obligated to incur, such as where a creditor brought an administrative expense  
14 claim for the damage to vehicles it leased from the claimant.

15 An administrative claim based on a claimed loss has to be on par with the benefit  
16 incurred by the estate, not simply with what the claimant calculates as its loss.<sup>5</sup> Courts  
17

18 <sup>4</sup> *In re Enron Corp.*, 279 B.R. 695, 705 (Bankr.S.D.N.Y. 2002) ("considering inducement  
19 by the debtor-in-possession to be a *crucial element* comports with the policy reason for  
allowing the priority, which is to encourage third parties to supply the debtor in possession  
20 with goods and services the goal of achieving reorganization to benefit all creditors"); *In re Gasel Transportation Lines, Inc.*, 326 B.R. 683, 687 (6<sup>th</sup> Cir. BAP 2005) ("in  
21 determining whether there was a transaction with the bankruptcy estate, the proper focus is  
on the inducement involved in causing the creditor to part with its goods or services")  
(internal quotations and citations omitted); *Globe Metallurgical, Inc.*, 312 B.R. 34, 40  
(Bankr. S.D.N.Y. 2004) ("a creditor provides consideration to the bankrupt estate *only*  
22 *when the debtor-in-possession induces the creditor's performance*").

23 <sup>5</sup> See e.g., *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976) (creditor administrative  
24 expense claim will only be afforded priority to the extent the estate benefited from the  
consideration supporting the claim); *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d  
25 957 (5<sup>th</sup> Cir. 1991) (punitive damages claim filed by company which had agreed to service  
debtor's oil wells, for debtor's alleged fraud in providing creditor with designs to increase  
26 wells' production, could not be allowed as "administrative expense," as allowance of claim  
would confer no possible benefit on bankruptcy estate.").

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 essentially look to whether the estate was unjustly enriched.<sup>6</sup> Thus, the administrative  
2 expense "should reflect actual value conferred on the bankrupt estate by reason of  
3 wrongful acts or breach of agreement."<sup>7</sup>

4 Sierra has not proved any gain on the part of USACM from whatever relationship  
5 Sierra thinks USACM has with Sierra. Certainly, USACM did not benefit from the loss in  
6 value of various properties that Sierra alleges. Paying Sierra's alleged losses as an  
7 administrative expense would harm the USACM estate and its successor the USACM  
8 Trust to the detriment of all the other remaining creditors, and run counter to the policies  
9 behind the priority provisions.

10 The USACM Trust acknowledges a line of cases based on a 1968 interpretation of  
11 Section 64 of the Bankruptcy Act, which held that tort claimants injured in a fire  
12 negligently started by the receivership could collect their tort damages as an administrative  
13 expense. The court stated that "actual and necessary costs" should include costs ordinarily  
14 incident to operation of a business, and not be limited to costs without which rehabilitation  
15 would be impossible."<sup>8</sup> The Ninth Circuit has, in dicta, assumed that *Reading* applies to

16 <sup>6</sup> *In re Enron Corp.*, 279 B.R. 695, 705 (Bankr.S.D.N.Y. 2002) ("the focus on allowance  
17 of a priority is to prevent unjust enrichment of the estate, not to compensate the creditor  
18 for its loss...thus, a court looks to the actual benefit to the estate not the loss sustained by a  
creditor").

19 <sup>7</sup> *In re United Trucking Service Inc.*, 851 F.2d 159, 162 (6<sup>th</sup> Cir. 1988) (claim for damage  
20 to vehicle leased to debtor: estate benefited by not having to repair the vehicles); *In re  
National Steel Corp.*, 316 B.R. 287 (Bankr.N.D.Ill. 2004) (claims "are to be measured by the benefit  
21 received by the estate rather than the costs incurred by a claimant"). The court in *National  
Steel* rejected an administrative expense claim where the creditor alleged damages  
22 stemming from the trustee's refusal to sell steel at the contract price, where the court found  
the estate did not benefit given that the price was still below market. Moreover, the court  
23 found that the creditor was seeking its costs and expenses incurred in as a result of the  
alleged breach by the debtor, which were not actually necessary to preserving the estate.  
*Id.* at 301. See *In re Stoecker*, 128 B.R. 205 (Bankr.N.D.Ill. 1991) ("in order to qualify as "actual"  
24 and "necessary" administrative expenses, expenditures must benefit the estate as a whole rather  
than just the creditor claimant."); *In re Subscription Television of Greater Atlanta*, 789 F.2d 1530, 1532  
(11<sup>th</sup> Cir. 1986) ("To accord a creditor holding an executory contract an administrative priority for  
25 every claim arising thereunder during the sixty-day section 365(d)(1) period would produce a  
strained and unintended construction of [§ 503].")

26 <sup>8</sup> *Reading Co. v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968).

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 Bankruptcy Code cases and that post-petition torts and contract breaches within the scope  
2 of *Reading* would give rise to an administrative expense.<sup>9</sup> Sierra has not proved either a  
3 tort or a breach of contract, and certainly has not proved the damages element of any such  
4 cause of action, as set forth below.

5 **III. At Most, Sierra Has A Pre-petition Unsecured Claim That Is Barred.**

6  
7 Because Sierra has not met the standard for administrative expense treatment, it has  
8 an unsecured claim that is time barred by this Court's proof of claim bar date as well as the  
9 Plan provisions described by USACM in its response and the Plan injunction. As this  
10 Court is well-aware, the deadline to file unsecured claim was November 13, 2006 for  
11 general unsecured creditors [Dkt. 1280]. Creditors who failed to timely file a proof of  
12 claim were explicitly warned as follows:

13 ANY HOLDER OF A CLAIM THAT IS NOT EXCEPTED  
14 FROM THE REQUIREMENTS OF THE BAR DATE  
15 ORDER, AS DESCRIBED IN SECTION 4 ABOVE, AND  
16 THAT FAILS TO TIMELY FILE A PROOF OF CLAIM IN  
17 THE APPROPRIATE FORM WILL BE FOREVER  
18 BARRED, ESTOPPED AND ENJOINED FROM  
19 ASSERTING SUCH CLAIM AGAINST THE DEBTORS,  
THEIR SUCCESSORS, THEIR CHAPTER 11 ESTATES  
AND THEIR RESPECTIVE PROPERTY OR FILING A  
PROOF OF CLAIM WITH RESPECT TO SUCH CLAIM,  
FROM PARTICIPATING IN ANY DISTRIBUTION IN THE  
DEBTORS' CASES ON ACCOUNT OF SUCH CLAIM OR  
RECEIVING FURTHER NOTICES REGARDING SUCH  
CLAIM.

20 [Dkt. 1358]. By special order of the court, Direct Lenders – who received the same notice  
21 as all creditors – were given a deadline of January 13, 2007, but the consequences for  
22 filing an untimely claim were the same [Dkt. 1358 and 1728].

23  
24  
25  
26 <sup>9</sup> See e.g., *In re Dennis Ponte, Inc.*, 61 B.R. 296 (9th Cir. BAP 1986); *Diners Club, Inc. v. Bumb*, 421 F.2d 396 (9<sup>th</sup> Cir. 1970).

1 Not only does the proof of claim bar date forever bar Sierra's claim, but USACM's  
 2 third amended plan of reorganization, confirmed on January 8, 2007 [Dkt. 2376],  
 3 discharges USACM from Sierra's untimely claim. The plan provides:

4 This Plan provides for an injunction of certain actions against  
 5 the Debtors. Holders of Claims against and Equity Interest in  
 6 the Debtors may not pursue (1) property of the Estates other  
 7 than through the Claims and Equity Interest allowance process;  
 8 or (2) the Debtors or their agents.

9 [Dkt. 1799]. A critical part of the "allowance process" is the claims bar date, which Sierra  
 10 and its assignor missed. Thus, its claim has been discharged by the Plan.

11 **IV. Sierra Has Not Proved its Damages Claim; The USACM Trust and its  
 12 Constituents Should Not Be Adversely Affected**

13 If Sierra is held to have met the standard for administrative expense treatment, it  
 14 still must meet its burden of providing the Court with real evidence of damages. The  
 15 Bankruptcy Code provides that only "actual" costs are entitled to priority.<sup>10</sup> Sierra's  
 16 "information and belief" affidavit about what USACM's post-petition management may  
 17 have done by a person whose expertise lies in claims trading, not real estate appraisal,  
 18 asserts speculative damage claims at best.<sup>11</sup>

19 It is also not clear what damages precisely Sierra is claiming. Certainly, only those  
 20 damages that actually occurred post-petition could possibly be collected as administrative  
 21 expenses. Thus, to the extent that any portion of the 25% in lost value Sierra Liquidity  
 22 claims occurred pre-petition (or pre assignment) those damages are not given priority.<sup>12</sup>

23  
 24 <sup>10</sup> 11 U.S.C. § 503(b)(1). See e.g., *In re Midway Airlines, Inc.*, 221 B.R. 411 (Bankr.  
 25 N.D.Ill. 1998) ("An administrative claimant does not meet its burden of proof where the  
 26 proof of claim is supported by estimates and where accurate documentation relating to the  
 proof of claim is not before the court").

<sup>11</sup> Riley Affidavit ¶ 2 (manager of company that trades in distressed trade claims and  
 securities; also the president over a decade ago of apartment, home and land entitlement  
 developer).

<sup>12</sup> *United Trucking Service*. 851 F.2d at 161-164 ("only those debts arising after the filing  
 of the bankruptcy petition may be afforded administrative expense status").

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 There is no competent evidence of a 25% decline in value, or that the value of the  
2 collateral was equal to the amount of the debt as of the petition date. There is no proof  
3 that if foreclosure proceedings had been commenced when Sierra contends that should  
4 have happened, it would not have been met with delay due to litigation, borrower  
5 bankruptcy filings, or other factors. To the contrary, Binford Medical pre-empted  
6 USACM with affirmative litigation to restrain any enforcement action. USA Investors, VI  
7 is an alleged debtor in an involuntary bankruptcy case, protected by the automatic stay.  
8

9 The USACM Trust relies on counsel for USACM and the Debtor's CRO to show  
10 Sierra's lack of a compensable damages claim, in more detail. The USACM Trust notes  
11 that losses from a decline in real estate values are not costs ordinarily incident to operation  
12 of a loan servicing business. That business is conducted pursuant to written LSAs. They  
13 provide that if USACM fails to act, the "Rights of Lender" are to join with others  
14 constituting 51% of the lenders on the applicable loan and replace USACM as servicing  
15 agent.

16 Sierra contends that it is damaged because it believes USACM under the CRO's  
17 administration deliberately delayed seeking foreclosure of liens in order to generate  
18 default interest, which it claims USACM could not collect upon a foreclosure. The  
19 USACM Trust believes that speculative damages assertions cannot justify an  
20 administrative expense claim. Sierra likewise has offered no support for its theory that  
21 lenders are entitled to all default interest upon a foreclosure sale. The USACM Trust  
22 understands that compensation of mortgage servicing agents through their retention of  
23 default interest and late charges is a typical industry provision. The servicing agent holds  
24 vested rights to accrued servicing fees and default interest when a foreclosure sale takes  
25 place. Those funds are paid by the borrower directly if it reinstates, or by the purchaser at  
26 the foreclosure sale effectively paying money for the borrower to satisfy its debt as the  
borrower's assignee in title. If the property is accepted by the foreclosing lender under a

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 credit bid, it is the borrower's value in the property that satisfies the borrower's obligation,  
2 and is obtained by the lender from the borrower – effectively paying in land instead of in  
3 cash.

4 All in all, Sierra has not met its burden of establishing an administrative expense  
5 claim, legally or factually, for the reasons set forth here and in the USACM opposition. Its  
6 administrative expense claim motion should be denied.

7 DATED: April 2, 2007  
8

9 **LEWIS AND ROCA LLP**

10  
11 By: /s/ RC (#6593)

12 Susan M. Freeman, AZ 4199 (*pro hac vice*)

13 Rob Charles, NV 6593

14 *Counsel for USACM Liquidating Trust*

15 Copy of the foregoing served on April 2, 2007, via email where an email address is listed,  
16 and if no email address is listed, then by first class U.S. Mail, postage paid, addressed to:

17 David T. Cohen, Esq.  
18 Alexandra P. Olenczuk, Esq.  
19 WARNER STEVENS, LLP  
20 301 Commerce Street, Suite 1700  
21 Fort Worth, TX 76102  
[mwarner@warnerstevens.com](mailto:mwarner@warnerstevens.com)

22 Michelle L. Abrams, Ltd.  
23 3085 S. Jones Blvd., Ste. C  
24 Las Vegas, NV 89146  
[mabrams@mabramslaw.com](mailto:mabrams@mabramslaw.com)

25 Annette W. Jarvis  
26 Steven C. Strong  
RAY QUINNEY & NEBEKER PC  
36 South State Street, Suite 1400  
PO Box 45385  
Salt Lake City, UT 84145-0385  
[ajarvis@rqn.com](mailto:ajarvis@rqn.com)  
[sstrong@rqn.com](mailto:sstrong@rqn.com)

LEWIS  
AND

ROCA  
LLP

LA W Y E R S

1 Lenard E. Schwartzer  
2 Jeanette E. McPherson  
3 SCHWARTZER & MCPHERSON LAW FIRM  
4 2850 S. Jones Blvd., Suite 1  
5 Las Vegas, NV 89146-5408  
6 [bkfilings@s-mlaw.com](mailto:bkfilings@s-mlaw.com)  
7 [jmcpherson@s-mlaw.com](mailto:jmcpherson@s-mlaw.com)

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
/s/ Christine E. Laurel  
Christine E. Laurel  
Lewis and Roca LLP